Supreme Court, U. S.
FILED
JUL 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1620

FIRST NATIONAL BANK AND TRUST COMPANY IN ALTON,
Executor of the Estate of Joseph E. Knight,
Petitioner.

vs.

SAMUEL BERKE, Receiver of City Savings Association,
Respondent.

PETITIONER'S REPLY BRIEF

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Pursuant to Rule 24.4 of the Rules of this Court, Petitioner addresses to arguments first raised in the Respondent's Brief in Opposition.

STATEMENT

On page 4 of the Respondent's Brief, reference is made to a court finding that "Knight's liquidation" was tainted with fraud. The court did not use Knight's name, nor was he a liquidator (A. 20). Moreover the order shows on its face that

it referred to an earlier order by a different judge, entered on September 7, 1968, which appointed receivers. This necessarily was prior to the initiation of the personal action against Knight (filed in January, 1969) and could not be binding upon him or his estate.

The fact is that the plan of liquidation was prepared not by Knight, but by the Attorney General of Illinois, which was expressly pleaded in paragraph 3 of our Answer to Count II (A. 94).

The name of C. Oran Mensik appears in four places on pages 3-4 of the Brief. His name is not once mentioned in the Amended First Cross Complaint (A. 87-A. 92).

REASONS FOR GRANTING WRIT OF CERTIORARI

On page 5 of the Respondent's Brief it is stated that "Petitioner asserts that Knight was entitled to absolute immunity from suit." In our Reasons for Granting Writ of Certiorari we definitely argue that Knight was entitled to immunity, but we do not ask that it be absolute. The Court of Appeals for the Seventh Circuit and the District Court refused to extend to Knight *any* immunity whatsoever.

On June 29, 1978, this Court published its opinion in the case of *Earl J. Butz, et al., Petitioners v. Arthur J. Economou, et al.*, No. 76-709, — U.S. —. In holding that the petitioners were not entitled to an absolute immunity for allegedly denying an individual's constitutional rights, the Court said in the fifth paragraph of Part III of its opinion:

> ". . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers."

In comparing the denial of constitutional rights by federal officers with the denial of civil rights under 42 U.S.C.A. §1983 by state officers, the Court implies that, in the absence of the denial of such rights by the officers, the latter would have immunity from personal actions.

Inasmuch as no denial of civil rights under 42 U.S.C.A. §1983, or of constitutional rights, was ever alleged as against Knight (App. I, p. A. 87-A. 92), under the reasoning of this Court in this most recent case, he and his Executor should be accorded immunity in this action.

II

On pages 6-7 of the Respondent's Brief it is argued that our Petition does not present a federal question. Under Rule 19.1 (b) of this Court it is not necessary that a federal question be presented in a petition for certiorari to a court of appeals, provided that the other required conditions are met, as they are here.

III

On page 7 of the Respondent's Brief are cited six cases which are said to hold that state banking officials are liable for *knowingly* permitting an unsound financial institution to remain open.

In the Receivers' Amended First Cross-Complaint it is not alleged that Knight *knowingly* or *wilfully* violated a duty (A. 87-A-92).

Moreover, all the cases cited by Respondent may be distinguished (emphasis supplied in each instance):

a) In *Crews v. American Surety Co. of New York*, 188 Okla. 486, 110 P. 2d 1108, l.c. 1110 (1941), a *"willful"* violation of a public officer's duty was alleged.

b) In *Gormley v. State*, 54 Ga. App. 843, 189 S.E. 288, l.c. 293 (1936), a judgment against a state superintendent of banks was *reversed* because of his official immunity, in the absence of allegations showing *"malice, fraud, corruption, or bad faith."*

c) In *Fidelity & Deposit Co. of Maryland v. Ware*, 47 Ariz. 12, 53 P.2d 415, l.c. 418 (1936), the court *reversed* a judgment on a bank commissioner's bond and ruled that the commissioner was clothed with "discretionary powers for the erroneous exercise of which he would not be liable to individuals unless he acted *willfully and maliciously and transcended his legal authority.*"

d) In *Button v. Nevin*, 44 Ariz. 247, 36 P. 2d 568, l.c. 570 (1934), it was noted that the superintendent *"willfully and knowingly"* allowed the bank to reopen.

e) In *Allen v. Title Guaranty and Surety Co.*, 27 Idaho 752, 152 P. 189, l.c. 192 (1915), the court found the bank examiner to have *"discretion"* in his investigation until he concluded that the bank was insolvent, at which point he had the ministerial duty to close it.

f) In *Mills v. American Surety of New York*, 26 Idaho 652, 145 P. 1097, l.c. 1104 (1914), it had been alleged that the bank commissioner " 'did not well, faithfully and impartially discharge the duties of his office', but, 'on the contrary, he wholly failed, neglected, omitted and *refused to do so, and acted unfaithfully, improperly, and illegally.*' . . ."

Moreover, not one of these state court cases modifies Rule 9 (b) of the Federal Rules of Civil Procedure, which provides in part that "Malice, intent, knowledge, and other condition of mind may be averred generally."

. . . . . .

On page 7 of the Respondent's Brief it is stated:

". . . In 1957 the State of Illinois had closed City Savings for inflated mortgage lending and capital impairment. Mensik v. Smith, 18 Ill. 2d 572, 166 N.E. 2d 265 (1960) . . ." The Brief fails to add that in that case the Illinois Supreme Court (l.c., p. 588) held that the closing of City Savings Association by the State of Illinois had been *wrongful.*

. . . . . .

On pages 7-10 of the Brief are detailed many statements against Knight, none of which evidence fraud, malice, or inten-

tional wrongdoing. Most of them are unsupported by reference to the Appendix and *none of them were pleaded* (A. 87-A. 92). Most important, they are not responsive to the arguments in our petition for certiorari.

An obvious example is the mention of the Mensik name in fourteen places on the four pages, whereas no mention of him, directly or indirectly, is made in the Respondent-Receiver's Amended Cross-Complaint. (A. 87-A. 92).

Another obvious example is the attack on the "Knight directed liquidation" that appears on page 9 of the Brief. As previously stated, Knight was not a liquidator. There was no evidence or allegation that he *directed* the liquidation. Count II of the Cross-Complaint is predicated upon Knight's delivery of the Association's assets to the liquidators, but it does not even intimate, much less allege, that the plan of liquidation or the manner of its adoption was fraudulent (A. 89-A. 92). Indeed, the transfer of assets to the liquidators was pursuant to a plan of liquidation that was prepared by the Attorney General of Illinois, as was pleaded in paragraph 3 of our answer to Count II (A. 94).

In the footnote on page 10 of the Brief it is argued that the *involuntary* liquidation provisions of the Illinois Savings and Loan Act apply to this case, which admittedly involved a *voluntary* liquidation. In doing so, the Respondent's Brief quotes Section 921 of the Act with emphasis as follows:

"Section 921. *Director to Appoint Receiver.* If the Director, after taking custody of an association under the Section of this Act concerning the Director's Authority to Take Custody, *finds that any one more of the reasons for taking custody continues to exist through the period of his custody*, then *he shall appoint* any qualified person, firm or corporation as receiver or co-receiver of such associations or trust for the purpose of liquidation. . . . *Id.* § 921."

The Brief does not attempt to explain how or why this statute on *involuntary* liquidations applies to *voluntary* liquidations; it is part of Article 10 of the Illinois Savings and Loan Act, which Article, on its face, applies exclusively to "INVOLUNTARY LIQUIDATION" (A. 83). Further, it ignores the fact that in the statutory provisions pertaining to voluntary liquidations, Article 9, Illinois Revised Statutes 1963, Ch. 32, § 901-909 (A. 78-A. 83), which were the only provisions that were applicable to the City Savings Association liquidation, there is no prohibition against the relinquishing, by the Director, of the assets to voluntary liquidators at any time.

CONCLUSION

For the foregoing reasons, together with those set forth in our Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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